Supreme Court, U.S.
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No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of the State Of Nebraska

PETITIONER'S REPLY BRIEF

MARK A. WEBER
Counsel of Record
WALENTINE, O'TOOLE,
McQUILLAN & GORDON
11301 Davenport Street
Omaha, NE 68154
(402) 330-6300

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. RESPONDENT'S UNTIMELY, HYBRID CLAIM OF PROCEDURAL BAR AND/OR NONRETROACTIVITY HAS NO BASIS IN EXISTING LAW, AND SHOULD NOT BE GIVEN ONE.

Respondent first seeks to avoid the Court's consideration of the constitutional issue in this case on procedural grounds. Respondent grudgingly acknowledges that the Nebraska Supreme Court unambiguously ruled on the merits of the *Cage* issue, so it cannot dispute the Court's jurisdiction to consider it.[1] See *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983); *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988). Nor does Respondent dispute that Petitioner's case was pending on certiorari from direct appeal at the time *Cage v. Louisiana*, 498 U.S. 288 (1990), was decided, so it cannot claim application of *Cage* to this case is barred by the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

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[1] Respondent is misleading in its representation of the Nebraska Supreme Court's treatment of this issue. The statements regarding the limited role of Nebraska postconviction review quoted at page 11 of Respondent's brief were addressed to a different group of "previously raised issues. . . ." See J.A. 36. The *Cage* issue was addressed only on its merits. See J.A. 35 – not merely as part of a claim of ineffective assistance of counsel, as Respondent claims. Resp. Brief at 12. The discussion of the ineffective assistance claim was separate and distinct from the decision on the merits of the *Cage* issue itself. See J.A. 33-35.

If there were any doubt about this, the Nebraska Supreme Court recently dispelled it by again reaffirming *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), and noting that it had done so in this case and the issue was pending before this Court. *State v. Cook*, 1993 WL 520410 (Neb. Sup. Ct. No. S-92-1096, filed December 17, 1993).

Instead, Respondent asks the Court to create a new, hybrid default/nonretroactivity rule, based on the idea that Petitioner is not "similarly situated" to the defendant in *Cage* because his counsel did not make a trial objection. Resp. Br. 13-15. Respondent gives no reason, besides its desire to avoid the merits of the constitutional issue in this case, why this Court should take this unprecedented step. There are several reasons the Court should not do so.

First is the fact that Respondent raised no similar claim of procedural bar in its Brief in Opposition to the Petition for Certiorari in this case. The failure to raise a procedural issue in the Brief Opposing Certiorari should, itself, preclude consideration of Respondent's argument at this time. Rule 15.2; See *City of Canton v. Harris*, 498 U.S. 378, 384 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

Second is the fact Respondent's proposed new rule would be directly inconsistent with current law regarding retroactivity, see *Griffith v. Kentucky*, 479 U.S. 314 (1987), and procedural default, *Harris v. Reed*, 489 U.S. 255 (1989). The law to date has been clear and consistent that "[i]f the last state court to be presented with a particular claim reaches the merits, it removes *any bar* to federal court review that might otherwise be available." *Ylst v. Nunnemaker*, 111 S.Ct. 2590, 2593 (1991) (emphasis added). Respondent's only authority for its new and different rule is an out-of-context citation to the equal treatment principles espoused in *Griffith* and *Teague*. What Respondent misses is that the references in those cases to "similarly situated" defendants was directed to those litigants' *chronological* situation, not every aspect of their cases.

No two parties are "similarly situated" in all respects; and there is no particular relation between the equal treatment principles on which *Griffith* was based and trial objections. The former are principles of federal law; the latter are governed by state procedural rules. What Respondent forgets is that different states have different rules governing whether a trial objection, or an appellate brief, or a state postconviction petition adequately presents a constitutional issue. This Court has treated litigants from different states as "similarly situated," with respect to the adequacy of their preservation of a federal issue, when the highest state court to examine their claim has found the issue adequately preserved to address it on the merits. Acceptance of Respondent's argument would exchange that straightforward retroactivity rule into a complex new code, which would make the retroactivity of every decision different in every case, depending upon whether a given defendant could claim enough similarities between his case and the precedent he cites to qualify for its application.[2]

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[2] Respondent's proposal assumes that new constitutional rules are announced only in cases in which there have been trial objections which meet its standards. Of course, they are not: some states consider constitutional claims raised for the first time on appeal; others forgive default in capital cases; others have a variety of exceptions to contemporaneous objection rules. Would Respondent's argument be the same if *Cage* were a case in which the Louisiana Supreme Court had forgiven a trial default, or considered an issue for the first time on appeal? By Respondent's logic, in that event the only litigants who would be "similarly situated" to Mr. Cage would be those who had not made trial objections. Would *Cage* extend only to them? Or would litigants who had made trial objections be entitled to even more favorable constitutional rules? Or would Respondent's new retroactivity rule simply be inapplicable in such cases?

The law regarding default, retroactivity, and the other procedural limits on federal court's consideration of federal constitutional claims is complex enough. To blur these two lines of authority would magnify that complexity severalfold. It also would effectively create a whole new set of Federal Rules of State Trial Procedure, which would operate independently of the rules set by the states themselves, to determine whether or not a defendant would qualify for the "retroactive" application of federal precedents to his case. That would be the antithesis of the deference to state sovereignty which the Court has held should be paramount in this area and indeed the deference Respondent and its *amici* seek. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991).

The Nebraska Supreme Court has made its position clear on the merits of this federal constitutional issue. It has reiterated that position, even when the issue is raised in a postconviction proceeding – in this case, and in others. See *State v. Cook, supra*. It is the Nebraska Court's prerogative to determine when and how it will decide federal constitutional claims. When it does, this Court's certiorari jurisdiction runs to review that state court's "final judgments and decrees," whatever preceded them. 28 U.S.C. §1257. Respondent's belated effort to change that fundamental federal/state relationship to avoid review in this case should be rejected.

II. RESPONDENT HAS IDENTIFIED NO LEGALLY-SUFFICIENT DISTINCTION BETWEEN THE INSTRUCTION GIVEN IN PETITIONER'S CASE AND THE UNCONSTITUTIONAL CAGE INSTRUCTION.

Respondent and several *amici* writers have attempted to distinguish the jury instruction given at Petitioner's trial, (J.A. 11), from the *Cage* instruction. These arguments merely play with semantics.

When the two instructions are read in sequence, they are in fact nearly identical in tone and content. The overall impression left by each of the instructions is a notion of "moral certainty," "substantial doubt," and "strong probabilities," which both substitute for the "indispensable" concept of reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Much of Respondent's position is derived from the approach used by the Nebraska Supreme Court in its attempt to salvage Nebraska's instruction in the wake of *Cage*. This same anallysis was rightly criticized by the United States District Court for the District of Nebraska: "[t]he fact that the wording of a particular instruction is distinguishable from the *Cage* instruction does not necessarily mean that the thought conveyed is also different, nor does it mean the instruction comports with due process." *Morley v. Stenberg*, 828 F.Supp. 1413, 1419 (D. Neb. 1993). When instructions are compared, "similarity of language may simplify the analysis, but dissimilar language by no means ends the inquiry." *Ibid*.

In this case, one is presented with the "simplifying" factor of extremely similar language, with only very

slight dissimilarities. The dissimilarities in no way salvage NJI 14.08 from *Cage* criticism. NJI 14.08 contains the "moral certainty" and "actual and substantial doubt" terminology which was condemned in *Cage*, along with equally troubling "strong probabilities" language. NJI 14.08 states that a reasonable doubt is "an actual and substantial doubt." This is exactly the same terminology as that which was specifically discussed and disapproved in *Cage* ("an actual substantial doubt"). 498 U.S. at 40. *Cage's* disapproval of the term "substantial doubt" was based upon the fact that "substantial" as it is commonly understood, "suggests a higher degree of doubt than is required under the reasonable doubt standard." *Id.* at 41.

This analysis is clearly correct. "Substantial" and "reasonable" amounts of any commodity are not the same amounts.

The Respondent attempts to defend NJI 14.08's usage of the term "substantial doubt" by noting that the instruction states that the doubt must arise from the evidence or lack thereof. This is simply irrelevant. It makes no difference that the instruction points out the proper *origins* of doubt (the evidence) if the *amount* of doubt (reasonable) is improperly defined ("substantial"). Regardless of where a juror finds the source of his doubt, the doubt is not helpful to the accused if the juror is led to believe that the doubt is not sufficiently "substantial," despite the fact that the doubt may meet the definition of "reasonable."

As the Eighth Circuit observed, disapproving the "substantial doubt" language twenty years ago in *United States v. Atkins*, 487 F.2d 257, 260 (8th Cir. 1973): "Proof of guilt beyond a reasonable doubt would seem to require a

greater evidentiary showing by the government than proof beyond a substantial doubt. For this reason, we do not approve of the alternative statement that reasonable doubt means a substantial doubt." See Petitioner's Brief on the Merits at page 21.

The Tenth Circuit Court of Appeals recently employed much of the same analysis in disapproving "substantial doubt" language. *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990). The Court quoted the following language with approval:

> "There is a significant difference between 'reasonable' doubt and 'substantial' doubt. The word, substantial, according to 'Webster's New World Dictionary' (1961) means 'real; actual; true; strong; solid; firm; ample; large; or of substantial value.' We think that when consideration is given to the definition and to the ordinary meaning of this word, there is little doubt but that its use tends to lessen the State's burden and as a natural corollary to increase the burden upon the defendant."

Id. at 891 quoting *United States v. Salley*, 9 M.J. 189, 192 (C.M.A. 1980) (citations omitted). See also, *United States v. Wright*, 542 F.2d 975, 988 (7th Cir. 1976) (warning that any Court using "substantial doubt" language "can reasonably expect a reversal"); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1972) (granting a new trial due to the Court's definition of reasonable doubt as "a very substantial doubt").

Respondent cites numerous cases which purportedly demonstrate that the equation of substantial doubt and reasonable doubt is an acceptable practice. Resp. Br. at 36.

Those cases lend little, if anything, to Respondent's position. The only decisions which were rendered subsequent to *Cage* were the state cases. Those cases are notable only for their dearth of serious analysis of either the instructions involved or their relationship to *Cage*.[3]

The federal cases cited by Appellant in its Addendum are equally unpersuasive. *Taylor v. Kentucky*, 436 U.S. 478 (1978) clearly questioned the "substantial doubt" language noting the frequent criticism it has received and saying, in dicta, that the phrase is "*perhaps* not in itself reversible error." *Id. at 478* (emphasis added). This is hardly an endorsement.

All of the other federal cases cited by Respondent were decided prior to *Cage*. Furthermore, most of them note the harsh criticism which has been leveled at the "substantial doubt" formulation, and many of the courts join in that criticism.[4]

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[3] For example, *State v. Jones*, 582 So.2d 973 (La. App. 4th Cir. 1991) (Respondent's Brief Addendum 2, p. 5) asserts that "substantial doubt" is acceptable language, with no analysis of *why* it is acceptable except to note the absence of *Cage's* other two criticized terms, (one of which is present here). *Id.* at 975. *Lord v. State*, 806 P.2d 548, 555 (Nev. 1991), adopts the same approach. *Adams v. State*, 587 So.2d 1265 (Ala. Cr. App. 1991), and *Smith v. State*, 588 So.2d 561 (Ala. Cr. App. 1991), both refuse to condemn reasonable doubt instructions, but they do so solely on the grounds that the instructions did not contain "grave uncertainty" language. No further analysis is provided by the Alabama courts.

[4] See, *e.g.*, *United States v. Fallon*, 488 F.2d 172, 176-77, (8th Cir. 1974) (specifically reaffirming *Atkins* condemnation of the language); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir. 1988) (noting the "universal" criticism of the phrase); *United States v. Delibac*, 925 F.2d 610, 614 (2d. Cir. 1991) (failing to cite or discuss *Cage*, but referring to the language as "an unenlightening instruction that we have only 'tolerated.'"); *Hathaway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981) (noting the criticism of the phrase); *Gaskins v. McKellar*, 916 F.2d 941, 952-53 (4th Cir. 1990) (specifically disapproving the language); *Smith v. Bordenkircher*, 718 F.2d 1273, 1277 (4th Cir. 1984) (noting uniform disapproval of the language and stating that court shared that viewpoint); *United States v. Zimiri-Safie*, 585 F.2d 1318, 1322 (5th Cir. 1978) (any future use of the language would be cause for reversal); *United States v. Rodriquez*, 585 F.2d 1234, 1241-42 (5th Cir. 1978) (same as *Zimiri-Safie*); *Payne v. Smith*, 667 F.2d 541, 546-47 (6th Cir. 1981) (noting criticism of the language); *United States v. Gratton*, 525 F.2d 1161, 1162 (7th Cir. 1975) (language was not plain error, but *was* objectionable); *United States v. Breedlove*, 576 F.2d 57 (5th Cir. 1978) (approving instruction which was used, but noting that Court has reversed on basis of "substantial doubt" language in the past).

Given the extremely weak support which Respondent and *amici* counsel's cited cases provide for "substantial doubt" language *prior* to *Cage*, it would seem likely that those courts' analyses would be quite different after the *Cage* decision. The Fourth Circuit Court of Appeals has held that an instruction which contained "substantial doubt" and "moral certainty" language violated *Cage*. *Adams v. Aiken*, 965 F.2d 1306, 1311 (4th Cir. 1992).[5]

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[5] *Adams* also held that *Cage* constitutes a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989). 965 F.2d at 1311-12. A case announces a "new rule" when it "breaks new ground or imposes a new obligation on the State or the Federal government," or "if the result was not *dictated* by precedent" prior to the case. 965 F.2d at 1311 (quoting *Teague*). If *Cage* announces a new rule, then the analyses of the pre-*Cage* courts cited by Respondent and its *amici* are simply irrelevant.

NJI 14.08 states, as does the *Cage* instruction, that mathematical certainty of guilt is not required to support a conviction. It says that a juror must have "an abiding conviction, *to a moral certainty,*" of guilt. (emphasis added). This language is virtually identical to the terminology which this Court specifically rejected in *Cage*. Moral certainty is a concept which suggests the possibility of conviction on the basis of intuition, or some factor other than *evidentiary* certainty, which is the only truly acceptable guidepost. *Cage*, 498 U.S. at 41; *Adams v. Aiken*, 965 F.2d at 1311; *State v. Manning*, 409 S.E.2d 372, 374 (S.C. 1991) (reversing conviction on the basis of instruction containing "moral certainty" and "substantial doubt" language); Brief of Petitioner, *Sandoval v. California*, No. 92-9049 at 20, 30.

Respondent again attempts to distinguish the use of this language in Petitioner's case from the *Cage* instruction based upon semantics. But as we read *Cage*, the Court condemned the injection of the very *concept* of moral certainty into jury instructions, *regardless* of the precise phrasing. 498 U.S. at 41. It is true that the Nebraska jury instruction tells jurors to consider all of the evidence; but the Louisiana instruction did as well, calling attention to evidence or its "satisfactory" or "unsatisfactory" nature. *Cage*, 498 U.S. at 40. Nonetheless, the Court found that the "moral certainty" and "substantial doubt" language to impermissibly dilute the constitutionally required standard of proof.

Respondent attempts to resurrect the Nebraska Supreme Court's perceived distinction between NJI 14.08 and the Louisiana instruction regarding moral certainty.

The Nebraska court's confusing "distinction" is as follows:

> [W]hile a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such *doubt* rises to the level of a moral certainty, the questioned instruction permits conviction only if the *lack* of such doubt is established to a moral certainty. In other words, under the *Cage* instruction, a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction, a juror is to vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other.
>
> *State v. Morley*, 239 Neb. 141, 155, 474 N.W.2d 660, 670 (1991). (emphasis added).

The Nebraska Supreme Court's interpretation of the Louisiana "moral certainty" language is directly contrary to this Court's reading of the Louisiana instruction as "stat[ing] that what was required was a 'moral certainty' *that the Defendant was guilty.*" *Cage v. Louisiana*, 498 U.S. at 41 (emphasis added). This is exactly the same approach which is expressed by the jury instruction in this case. There is *no* suggestion by this Court that the Louisiana instruction requires that there be moral certainty of a juror's *doubt*. With respect, we can see no basis for the Nebraska Supreme Court's reading of the Louisiana instruction, or Respondent's.

There is one and only one fairly arguable difference between this instruction and the one condemned in *Cage*:

this instruction did not use the phrase "grave uncertainty." Respondent and its *amici* correctly point out that, in an opinion respecting the denial of *certiorari* in *Gaskins v. McKellar*, 111 S.Ct. 2277 (1991), Justice Stevens suggested those words may have been a particular concern in *Cage*. But we do not read Justice Stevens' opinion to say that it is only the use of those words that led to the reversal in *Cage;* that would contradict the *Cage* opinion itself.

The lower court opinions in *Gaskins* do not set out the full text of the instruction challenged there; their focus was on the phrase "substantial doubt." See *Gaskins v. McKellar*, 916 F.2d 941, 952 (4th Cir. 1990). Neither those opinions, or Justice Stevens, suggests that the instruction there contained the "moral certainty" language shared by the instruction in *Cage* and the one in this case. Nor is there any suggestion that the South Carolina court instructed the jury – as the Nebraska court did here – that "strong probabilities" could amount to proof beyond a reasonable doubt, or that the jurors could be "fully aware of the possibility that [they] could be mistaken," and yet convict. See J.A. 11.

We submit this language – which Respondent and its *amici* ignore – denigrates the concept of proof beyond a reasonable doubt at least as much as the "grave uncertainty" language used in *Cage*.[6] We are reinforced in this

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[6] Moreover, we note that the Nebraska instruction does suggest doubts must be "grave," in its reference to doubts that would influence a decision "in one of the graver and more important transactions of life. . . . " J.A. 11. The context of this sentence does not make it clear whether the "grave" decision would be to convict or acquit. Jurors could easily read this sentence, in connection with the "substantial doubt" language, to mean that their doubts must be sufficiently substantial to lead them to take the "grave" step of acquitting a defendant they think is possibly or probably guilty of a serious crime.

by the decision of the Fourth Circuit – the court whose decision was challenged in *Gaskins* – in *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992). The court in Adams rejected the argument that the phrase "grave uncertainty" in *Cage* was a talisman for reversal. Accord, *State v. Manning*, 409 S.E.2d 372 (S.C. 1991).

We believe those courts are correct, that *Cage* meant what it said and did not establish a constitutional rule which turned on a specific word or – as many of Respondent's arguments essentially argue – on particular forms of punctuation. *Cage* held that an attempt to define reasonable doubt[7] could convey a degree of certainty which fell below the minimum required by due process – and that the language of the jury instruction in that case fell below that minimum. Although there are some minor differences – differences which we submit cut both ways – we cannot see a meaningful difference between this instruction and the one in *Cage;* and neither the Respondent nor its formidable array of *amici* have convincingly demonstrated one.

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[7] We have no quarrel with the argument – made most effectively by the Solicitor General – that it would be constitutional, and may be advisable, to give juries no definition of "proof beyond a reasonable doubt" at all. Brief of the United States at 6. The issue in this case however is not whether a definitional instruction must be given; the question is whether it violates due process to give an instruction which diminishes the concept in the manner of the instruction condemned in *Cage*.

Sandoval v. California presents this Court with the question of whether one part of the *Cage* instruction, alone – "moral certainty" – is sufficient, alone, to violate due process. This case presents the question of whether, as Respondent would have it, due process is violated only where the exact words of the *Cage* instruction are repeated verbatim. We cannot believe *Cage* established such a formalistic rule. Wherever, between *Cage* and *Sandoval*, the constitutional line is drawn, the instruction in this case falls outside it.

III. RESPONDENT'S DIRE PREDICTIONS OF THE EFFECT OF A REVERSAL IN THIS CASE ARE GREATLY EXAGGERATED.

The Respondent's brief mimics some of the arguments made by the State of California and its *amici* in *Sandoval v. California*, regarding the impact of a decision that finds constitutional error in any instruction which defines proof beyond a reasonable doubt in terms of "moral certainty." Resp. Br. 15. see Resp. Br.; *Sandoval v. California* and *amici*'s briefs[8]. From a review of the instructions compiled by the Petitioner in *Sandoval*, these

[8] Notably, the several states which filed as *amici* in *Sandoval* did not make similar predictions regarding the effect on them of a reversal in this case. See, Brief of Amicus Curiae of the States of Massachusetts, etc., *Sandoval v. California*, No. 92-9049. Similarly, although the Solicitor General's Brief is less clear on the distinction, it is plain from a review of the standard federal instructions it describes that the instruction challenged here bears little resemblance to the instructions used in federal criminal trials. Brief of the United States at 11.

fears appear to us to be somewhat exaggerated; Respondent's clearly are. Few, if any, states appear to use the kind of multi-flawed language which appears in this case and *Cage*. In Nebraska itself, the defective instruction is no longer used. See Petitioner's Brief, *Sandoval v. California* at Appendix B-23. The only cases which would be directly affected by a decision in Petitioner's favor would be those which, like his, became final after *Cage*, but were tried before the advent of the new standard instruction. We have no estimate of those numbers; but certainly, they are levels of magnitude lower than the figures thrown out in the Respondent's Brief.[9] It has been three years since the Court's decision in *Cage*; although a number of cases have raised the issue, we see no sign of the kind of general clearing of the jails Respondent warns of. We doubt that the application of *Cage's* rule to this virtually-identical case will have any such effect.

We do not mean by this to deny the significance of this issue. It is true that there are a substantial number of cases in Nebraska which may be affected by a reversal here, particularly in light of the Nebraska Supreme Court's decision to consider this issue in postconviction proceedings. If retrials are required in these cases, that will impose some real costs on the state. But it should not be forgotten that there are costs – human, moral, legal, and financial, – involved in the incarceration and execution of prisoners who have not been found guilty of

[9] There are only approximately three thousand people presently incarcerated in the entire Nebraska prison system. In Nebraska, as elsewhere, most convictions result from guilty pleas, not trials.

crimes by the standard of certainty set by the constitution. If *Cage* is correct in its underlying premise, some of those convictions are wrong; some of those prisoners are not truly guilty beyond a reasonable doubt, and should have their convictions set aside. Many of them, doubtless, are guilty; and their retrials will therefore likely result in another conviction.

This case is not about those prisoners, however. This case is about Clarence Victor. Mr. Victor stands condemned, not because of his prior criminal record, or even because he killed Alyce Singleton, but because a jury found that killing was premeditated. On that crucial issue, there was room for doubt; but the jury was told to ignore those doubts unless they were "substantial," to convict of the highest degree of crime if it found a "fair probability" its elements were proven, to decide not on the evidence but on its "moral" conviction. We maintain that *Cage* holds those are not the standards the constitution requires. That is the only issue properly before this Court for decision in this case.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully Submitted,

CLARENCE VICTOR,
Petitioner,

MARK A. WEBER
Counsel of Record
WALENTINE, O'TOOLE,
MCQUILLAN & GORDON
11301 Davenport Street
Omaha, NE 68154
(402) 330-6300

Attorney for Petitioner